Switzerland

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Abstract: The report presents and discusses norms of Swiss law ensuring access to remedy for human rights and environmental harm that a company located in Switzerland may cause or contribute to cause abroad. In addition to questions of jurisdiction and applicable law in transnational matters, the report analyses current developments on parent company liability in Swiss private law. In particular, it presents the constitutional Responsible Business Initiative and its parliamentary counter-proposal.

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1 Definition et sources

1.1 Definition of corporate social responsibility in Switzerland

There is no definition of corporate social responsibility in Swiss law. In April 2015, however, the Swiss Federal Council, the highest executive body in Switzerland, adopted a Position Paper on Corporate Social Responsibility.[2] Although the position paper has no legally binding effect, it defines the notion of corporate social responsibility as encompassing themes, such as working conditions, human rights, the environment, corruption prevention, fair competition, consumers interests, tax policies and transparency, that companies must take into account in parallel to the interests of the company owners.[3] Additionally, when the legal framework is insufficiently developed abroad, companies are expected not to exploit regulation gaps but to apply internationally recognized conduct standards. Among those norms, the Swiss position paper on corporate social responsibility cites in particular the United Nations Guiding Principles on Business and Human Rights (UNGP), the OECD Guidelines on Multinational Enterprises and the ISO norm 260000 on Social responsibility.[4]

The position paper further contains an action plan, which is not the National Action Plan on the implementation of the UNGP, in which Switzerland presents four strategies with regard to corporate social responsibility. The Swiss government plans to develop the definitional corporate social responsibility framework within international fora, such as the United Nations or the OECD; to support companies implementing their corporate social responsibility; to promote corporate social responsibility in developing countries and, finally, to work for the improvement of corporate transparency.[5] The position paper does not address the question of introducing a mandatory due diligence obligation for corporations operating abroad. They do not clarify the conditions of liability for these companies.[6]

1.2 The Swiss OECD National Contact Point

[2] Swiss Federal Council (SFC), La responsabilité sociétale des entreprises : Position et plan d'action du Conseil fédéral concernant la responsabilité des entreprises à l'égard de la société et de l'environnement (1 April 2015) <http://www.news.admin.ch/NSBSubscriber/message/attachments/38882.pdf> hereinafter « SFC, Responsabilité sociétale des entreprises ».
[3] *Ibid*., at 5.
[4] *Ibid*., at 6.
[5] SFC, Responsabilité sociétale des entreprises, 13-17.
[6] Weber (2016), 123; as noted Kaufmann (2016), 47.

Switzerland is a member of the OECD and has a National Contact Point (NCP) within the State Secretariat of Economic Affairs. The NCP accepts submissions raising specific instances regarding possible violations by companies of the OECD Guidelines. After an initial assessment, the NCP offers the parties involved its good offices. If the parties reach an agreement or find a solution to the dispute, the NCP publishes a final statement.[7] To date, some twelve final statements have been published on the NCP website and two pending cases are currently discussed.[8] A recently published report presents the structure and activities of the Swiss NCP.[9]

Among other recent cases, the NCP received a written submission against the FIFA, which is headquartered in Zurich, concerning human rights violations of migrant workers during the construction of facilities for the 2022 World Cup in Qatar. The trade union Building and Wood Workers' International claimed that the FIFA violated the OECD Guidelines by appointing Qatar and failing to conduct adequate human rights due diligence since then to prevent well-documented human rights violations of migrant workers.[10] In May 2017, the parties agreed to publish a final statement in which the FIFA agreed to follow guidance from the OECD Guidelines and the UN Guiding Principles on Business and Human Rights and accepted responsibility in terms of contributing to ensure, including through the use of its leverage, a due diligence process in the FIFA World Cup-related construction sites.[11]

1.3 Actions taken under the UNGP 2011

Switzerland published its National Action Plan (NAP) on the implementation of the UNGP in December 2016. Additionally, it took measures regarding corporate social responsibility and due diligence in specific sectors. The NAP does not introduce a mandatory human rights due diligence obligation in Swiss law. It also does not clarify the conditions of liability for human rights abuses committed by Swiss-registered companies abroad. To fill these gaps, a coalition of Swiss NGOs submitted a constitutional popular initiative that aims at introducing a specific provision on responsible business in the Swiss Constitution. In order to avoid a popular vote, the parliament is currently elaborating a counter-proposal at the legislative level. These developments are presented in turn.

The Swiss National Action Plan 2016

On 9 December 2016, the Federal Council presented its National Action Plan (NAP) on the implementation of the UNGP, which should be read as a complement of equivalent value to

[7] State Secretariat for Economic Affairs, National Contact Point for Switzerland : Information on the Specific Instances Procedure (November 2014).
[8] <https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP.html>
[9] Kaufmann, Heckendorn 2018, 29-33.
[10] NCP, Initial Assessment: Specific Instance regarding the Fédération Internationale de Football Association (FIFA) submitted by the Building and Wood Workers' International (BWI), (13 October 2015).
[11] NCP, Final Statement, Specific Instance regarding the Fédération Internationale de Football Association (FIFA) submitted by the Building and Wood Workers' International (BWI), (2 May 2017), 4.

the Position Paper on Corporate Social Responsibility of 2015.[12] The Federal Council expects corporations to conduct due diligence in their activities in Switzerland and abroad.[13]

Regarding access to justice for victims of corporate abuses abroad pursuing to the third pillar of the UNGP, the Federal Council notes that there is always a forum in Switzerland for torts when the corporation is domiciled in Switzerland. In addition, overriding mandatory provisions of Swiss law, in particular those relating to human rights, are in any event applicable regardless of the law designated by the choice-of-law rules.[14] However, it acknowledges that there is no legally binding provision in Swiss law compelling corporations to conduct human rights due diligence in their operations abroad. In this regard, it notes that no other country has adopted such legally binding provisions and concludes that, in order to avoid that the Swiss economy be penalized, any regulation that Switzerland would introduce in that regard should be largely supported internationally.[15]

Recently, Switzerland commissioned a report to evaluate and compare international developments on access to remedy for victims of corporate abuses.[16] Despite some international legal developments identified in the report, the Federal Council does not recommend the adoption of regulatory measures in corporate law, tort law or international private law.[17] However, it mentions the pending responsible business initiative and its legislative counter-proposal. Both aim at introducing a mandatory due diligence obligation for corporations and clarifying the conditions of liability.[18] These discussions are presented below.

Legislative measures adopted in specific sectors

Beyond political developments concerning companies in all economic sectors, the Swiss government has taken some measures in specific sectors. The recent Federal Act on Private Security Services Provided Abroad (PSSA) applies to Swiss and foreign companies that provides, from Switzerland, private security services abroad as well as to Swiss or foreign companies that establish, base, operate, or manage a company in Switzerland that provides such services abroad. It aims at prohibiting the provision of private security services for the purpose of direct participation in hostilities abroad or in connection with the commission of serious human rights violations.[19] These prohibitions apply expressly to parent companies and companies that subcontract the provision of a security service (subcontracting companies) to another company (the subcontractor).[20]

Regarding liability, criminal sanctions are in place for individuals who infringe the prohibitions.[21] Financial compensation for harm caused by private security services remains

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[12] Swiss Federal Council, 'Rapport sur la stratégie de la Suisse visant à mettre en œuvre les Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme' (9 December 2016), 12 ; <https://www.parlament.ch/centers/eparl/curia/2012/20123503/Bericht%20BR%20F.pdf> ; hereinafter National Action Plan
[13] *Ibid*., 7-8.
[14] *Ibid.*, 39.
[15] *Ibid*., 15.
[16] Christine Kaufmann/Lukas Heckendorn, *Access to Remedy*, n 9.
[17] Swiss Federal Council, Entreprises et droits de l'homme : analyse comparée des mesures judiciaires offrant un accès à la réparation (14 Septembre 2018), 14-15.
[18] *Ibid*., 15.
[19] Swiss Federal Act on Private Security Services Provided Abroad, art. 8 and 9.
[20] *Ibid*. art 5.
[21] *Ibid*. art 21-24.

to be determined in accordance with general rules on torts under Swiss law. Interestingly, Article 6 PSSA clarifies that where a Swiss company subcontracts the provision of a security service abroad, it shall ensure that its subcontractor performs that service in keeping with the constraints to which the subcontracting company is itself subject. Its liability for harm caused by the (foreign) subcontractor should be determined in accordance with the Swiss Code of Obligations.[22] The problem is that the Swiss Code of Obligations does not entail any specific provision on the extracontractual liability of subcontracting companies for harm caused to third parties by subcontractors and there is no relevant practice in that regard.[23]

Finally, the Swiss government has taken steps or is considering to adopt measures on corporate responsibility to respect human rights in the commodity sector.[24] It is about to adopt a legally non-binding guide on the implementation of the UNGP in the commodity trading sector.[25] Switzerland is following international legislative developments, in particular those in the European Union, on due diligence for importers of minerals originating from conflict areas.[26] It envisages the possibility to adopt similar provisions adapted to the Swiss context.[27] There is no recommendation, however, clarifying the conditions of corporate liability of parent, subcontracting or contracting companies in the commodity sector for human rights abuses.

The Responsible business initiative and its counter-proposal

In parallel to the above-mentioned political developments, a coalition of NGOs in Switzerland launched the popular constitutional initiative called *Responsible Business: Protecting Human Rights and the Environment*. The text of the initiative is reproduced in Annex II. The initiative collected the requisite threshold of 100,000 signatures. It will be submitted to Swiss citizens unless a satisfactory counter-proposal is adopted. The popular initiative aims at adding a new Article 101a, under the heading "Responsibility of business", to the Swiss Constitution. The proposal introduces a mandatory due diligence provision for corporations as well as a specific liability rule in case of its breach,[28] which should fill the liability gap of the Position Paper on Corporate Social Responsibility and the National Action Plan.

According to Article 101a of the Swiss Constitution, companies in Switzerland must respect internationally recognized human rights and environmental standards and ensure that these are also respected by companies under their control.[29] Concretely, the initiative requires companies to carry out appropriate due diligence, as defined in the UNGP.[30] Beyond mandatory due diligence, the initiative text specifies that corporations are liable for the damage caused by themselves and by those under their control unless they can prove that they

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[22] *Ibid*. art 6.
[23] Bueno, Scheidt (2015), 10.
[24] *See* Plateforme interdépartementale « matières premières », 3e rapport concernant l'état d'avancement de la mise en œuvre des recommandations (2 December 2016), Recommandations 11 and 12, at 13-14. <https://www.newsd.admin.ch/newsd/message/attachments/46473.pdf>.
[25] Institute for Human Rights and Business, Draft Human Rights Guidance for the Commodities Trading Sector, <https://www.ihrb.org/focus-areas/commodities/public-consultation-draft-human-rights-guidance-commodities-trading>
[26] Plateforme interdépartementale, at 14; *see* Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.
[27] National Action Plan, 29.
[28] Art. 101a(2)(b) and (c) Responsible Business Initiative.
[29] Art. 101a(2)(a) Responsible Business Initiative.
[30] Art. 101a(2)(b) Responsible Business Initiative.

took all due care to avoid the damage, or that the damage would have occurred even if all due care had been taken.[31] If the Swiss electorate accepts the constitutional initiative, a mandatory due diligence provision and a liability rule for Swiss-based corporations operating abroad will have to be elaborated and implemented in the sub-constitutional federal legislation, probably in the Swiss Code of Obligations (CO).

As a result of the initiative, the Parliament is currently discussing a counter-proposal in the form of a modification of the Swiss Code of Obligations. The counter-proposal is drafted with a view to avoid a popular vote; if it is adopted, the initiative committee may withdraw the initiative. The counter-proposal text, as adopted by one chamber in June 2018, is reproduced in part in Annex III. The second chamber will discuss the text in 2019. To date, the counter-proposal includes three elements. First, Article 716a^{bis} CO defines the due diligence that some companies are required to conduct. Second, Article 55(1ter) CO introduces a specific liability of parent companies for the harm caused by controlled companies. Finally, Article 139a SPILA entails a specific rule to ensuring application of these provisions in international matters. Each element presents specificities presented below in light of existing Swiss law.

2 Characterisation

2.1 CSR rules pertaining to company law

As the discussion on the counter-proposal shows, there is currently no provision in Swiss company law aiming at ensuring that companies or the board of directors of a company respect human rights, the environment or other societal interests abroad. With respect to companies limited by shares, Article 716a of the Swiss Code of Obligations (CO) enumerates an exhaustive list of non-transferable duties of the board of directors. Regarding social responsibility, Article 716a(1) para 5 CO states to date that the board of directors has the duty to overall supervise the persons entrusted with managing the company, in particular with regard to compliance with the law, operational regulations and directives.[32] The counter-proposal adds that it must supervise them as well with regard to compliance with provisions relating to human rights and the environment, including conduct taking place abroad.[33]

These duties, however, only relate to the protection of the company's interests and not those of affected third parties.[34] Article 754 CO makes this clear by stating that the individual members of the board of directors of the company are liable for any loss or damage arising from intentional or negligent breach of their duties both to the company and to the individual shareholders and creditors, however not to third injured persons. The counter-proposal not only does not modify this provision, but also excludes the liability of individual members of the board of directors for a damage caused by a controlled company.[35]

2.2 CSR rules pertaining to the law of contract

There are no specific rules in Swiss contract law aiming at implementing corporate social responsibility of Swiss-based companies for their activities abroad. Conversely, however,

[31] Art. 101a(2)(c) Responsible Business Initiative.
[32] Swiss Institute of Comparative Law (2013), 42.
[33] Proposed Art. 716(1)(5) CO.
[34] Swiss Institute of Comparative Law (2013), 45-46; Forstmoster (2015), 172.
[35] Proposed Art. 759a CO.

Article 5 of the Posted-Workers Act[36] requires that subcontracting companies in the construction sector ensure that all their subcontractors respect minimum wages and labour standards when employing workers in Switzerland. Accordingly, the contracting company must take all contractual measures in order to oblige its subcontractors to respect those minimum standards in Switzerland.[37]

2.3 CSR Rules pertaining to tort law

To date, there is no specific mandatory provision in Swiss tort law that requires Swiss-based companies to respect human rights, the environment or other societal interests when they conduct business abroad. Existing general rules of liability in tort law apply, provided Swiss law is applicable, to companies that cause a damage abroad through their own activities or through the activities of a foreign subsidiary or subcontractor. The Swiss literature concerning business and human rights discusses how to apply existing rules of fault liability (Article 41 CO) and of vicarious liability (Article 55 CO) to such situations. In this regard, the Swiss constitutional initiative and its counter-proposal both purports to clarify the conditions of corporate liability.

General conditions of direct liability (fault liability)

Article 41 CO establishes the general conditions of liability in tort law. Accordingly, any person, natural or legal, who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation.[38] There are four conditions of liability under Article 41 CO: a damage, a relationship of causality between the harmful event and the damage, a wrongful act, and a fault.[39] There is a fault, understood as reproachable conduct, when a person wilfully or negligently does not meet an expected standard of conduct in given circumstances. A conduct is negligent, when a person does not want the result, but lacks to meet the diligence that can be expected from a person of the category of the tortfeasor.[40]

The judiciary also distinguishes between active conducts and omissions. In the event that an omission of the company is reproached, a duty to act is required to make that omission wrongful. Such a duty exists when the tortfeasor owes a duty of care to the injured party.[41] A duty of care exists, for instance, when it is expressly required by law or when an activity creates a specific risk for others.[42]

In a first tort law case in Switzerland submitted after the adoption of the UNGP, a Bangladeshi worker and trade unions argued that the FIFA, which is registered in Zurich, attributed the 2022 World Cup to Qatar despite well-documented abuses due to the kafala sponsorship system. Such a system prohibited the claimant, to quit, change work or leave Qatar without the consent of his sponsor-employer, who retained his travel documents.[43] In addition, the trade unions reproached the FIFA for omitting to require reforms of labour market from Qatar.[44] Regarding compensation based on Article 41 CO (fault liability), the

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[36] Loi fédérale sur les mesures d'accompagnement applicables aux travailleurs détachés et aux contrôles des salaires minimaux prévus par les contrats-types de travail du 8 octobre 1999.
[37] Ordonnance sur les travailleurs détachés en Suisse, art. 8c.
[38] Art. 41 CO.
[39] Werro, (2012), art. 41 § 7; Kessler (2015), 321, § 2c.
[40] Werro, (2012), art. 41 § 57; Kessler (2015), § 48a.
[41] Werro, (2012), art. 41 § 77; Kessler (2015), § 37.
[42] Werro, (2012), art. 41 § 79-81.
[43] Handelsgericht des Kantons Zurich, HG160261-O [unpublished], 3 January 2017, 13.
[44] *Ibid*., 14.

Commercial Court of Zurich found that the claim did not demonstrate precisely enough what acts or omissions of the FIFA did violate the claimant's rights. It found further that the FIFA did not have a direct possibility to influence Qatari law or was active in the construction of infrastructure projects. In any event, even if it could be proved that the FIFA had such a leverage over Qatar, the matter would not be of a commercial nature, and therefore the Commercial Court would not be competent.[45] The Court did not place the case into the business and human rights debate or made a reference to the international due diligence standard, despite a parallel proceeding before the Swiss National Contact Point.[46]

To date, there is no objectified standard of conduct or case law establishing what is the conduct expected from a Swiss-registered company operating abroad with regard to human rights or the environment. There is also no express legal obligation for companies to actively prevent a harm abroad. By requiring companies to carry out appropriate due diligence regarding human rights and the environment,[47] both the popular initiative and its counter-proposal would introduce such specific standard of conduct based on the UNGP in Swiss law.

For public companies limited by shares, article 716a^{bis}(1) CO of the counter-proposal establishes that the board of directors must take measures to ensure that the company respects provisions related to human rights and the protection of the environment, including its activities abroad.[48] These are international provisions that are legally binding for Switzerland.[49] Concretely, the board of directors must identify and assess actual and potential human rights and environmental impacts; take measures to prevent risks and mitigate violations as well as track the effectiveness of the measures and account for how it addresses impacts. This due diligence applies explicitly over impacts resulting from activities of controlled companies as well as business relationships.[50] In contrast to the responsible business initiative, this mandatory due diligence shall apply to companies, controlled companies included, reaching two out of the three following thresholds: a balance sheet of 40 million CHF, a turnover of 80 million CHF or employment of 500 employees.[51] Nevertheless, smaller companies are also subject to the same due diligence when their activities present a particular risk.[52]

Liability for damage caused by others

Article 55 CO relates to the liability that an employer, as a principal, holds for a tort caused by auxiliaries. Accordingly, an employer is liable for the loss or damage caused by his employees in the performance of their work unless he proves that he took all due care to avoid a loss or damage of this type or that the loss or damage would have occurred even if all due care had been taken. The three conditions of liability under article 55 CO are a wrongful act of the auxiliary in the performance of his or her work; a relationship of subordination between the auxiliary and the employer; and the absence of a proof that the employer took all due care in selecting, instructing, and supervising that person.[53]

It is discussed in the literature concerning business and human rights whether Article 55 CO could apply to hold a parent or a subcontracting company responsible for the damage caused

[45] *Ibid*., 15. *See also* Bueno (2017), 1019.
[46] *See* also the outcome of the mediation process at the Swiss National Contact Point in section 1.2 above.
[47] Art. 101a(2)(b) Responsible Business Initiative.
[48] This provision shall apply by analogy to limited liability companies, cooperatives and associations.
[49] Proposed Art. 716^{abis}(6) CO.
[50] Proposed Art. 716^{abis}(1) *in fine* CO.
[51] Proposed Art. 716^{abis}(3) CO.
[52] Proposed Art. 716^{abis}(4) CO.
[53] Werro (2012), art. 55, § 6.

by a controlled subsidiary or subcontractor abroad.[54] The notion of employer in Article 55 CO does not require an employment contract or any other contract but the existence of a practical relationship of subordination.[55] A part of the literature, however, considers that auxiliaries cannot be legal persons[56] while, for the other part, there is no reason to exclude that a relationship of subordination may exist between two legal entities,[57] as known in other countries. They argue accordingly that Article 55 CO should encompass liability of companies for the harm caused by other companies under their control,[58] including subsidiaries within a corporate group.[59]

By establishing a specific liability for parent companies in the proposed Article 55(1bis) CO, the counter-proposal clarifies the scope of this liability.[60] Companies subject to due diligence obligations, as presented above, are liable for the damage caused by a controlled company to life, physical integrity or propriety, in violation of a provision relating to human rights and the environment. The parent company is not liable if it can prove that it took the required measures to protect human rights and the environment pursuing to Article 716a^{bis}(1) CO or that it could not influence the controlled company.[61] This specific liability for the damage caused by a controlled company does not apply for the damage caused by economically dependent companies that are not controlled, such as independent suppliers.[62]

3 Jurisdiction

3.1 Defendant's domicile in Switzerland

An international claim in tort can be brought before Swiss court whenever the defendant is domiciled in Switzerland. According to Article 2(1) of the 2007 Lugano Convention, which is in force in Switzerland since 2011, persons domiciled in a State bound by the Convention shall be sued in the courts of that State. The notion of domicile is defined by Article 60 of the Lugano Convention and it encompasses both the statutory seat and the "real" seat (which includes both the central administration and the principal place of business). Under this provision, a Swiss company can always be sued in a Swiss court for the alleged violation of CSR rules or standard, even if the violation has occurred, or has caused a damage, abroad.

It is also worth noting that – contrary to the courts of several foreign countries, in particular common law jurisdictions – Swiss courts cannot stay or dismiss an action on the ground that foreign courts (e.g. the courts of the place of the tort) are better placed to hear the case. Swiss courts do not apply the doctrine of *forum non conveniens*; in any event, the latter would be incompatible with the Lugano Convention[63]. This is in line with the Recommendation on

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[54] Membrez (2012), 31; Kaufmann et al. (2013), 43; Bueno, Scheidt (2015), 9.
[55] Werro (2012), art. 55, § 7. Kessler (2015), § 8.
[56] Kessler (2015), § 8. Swiss Supreme Court, DFT 42 II 611, 615 (23 November 1916). *See* Werro (2012), art. 55, §8.
[57] Kuonen (2007), 498-500.
[58] *Ibid*., 500.
[59] Membrez (2012), 32; Von Büren (2017), 954.
[60] *Ibid.*, at 954; *see* Art. 101a(2)(b) Popular Constitutional Initiative and commentaries at https://www.news.admin.ch/NSBSubscriber/message/attachments/30134.pdf.
[61] *See* Proposed art. 55(1bis) CO.
[62] Proposed Art. 55(1ter) CO.
[63] ECJ, 1.3 2005, in the case C-281/02, *Owusu*, ECR I-1383.

Human Rights and Business, which was newly adopted by the Committee of Ministers of the Council of Europe.[64]

However, Swiss courts must stay their proceedings (and eventually dismiss the action) when proceedings having the same object and the same cause of action between the same parties were previously instituted before a foreign court. If the court first seized is a court in a State bound by the Lugano Convention, the court second seized must immediately stay the proceedings and then dismiss the action, once the foreign court has ruled on its own jurisdiction (art. 27 Lugano Convention). By contrast, if the foreign court first seized is that of a country not bound by the Lugano Convention, a Swiss court has to stay the proceedings only when it appears that the foreign court will render, within a reasonable timeframe, a decision that is capable of being recognised in Switzerland (Article 9(1) SPILA); the Swiss proceedings will then be dismissed only when such recognizable decision has been presented to the Swiss court (Article 9(3) SPILA).

3.2 Jurisdiction at the place of the tort

The jurisdiction of Swiss courts is more difficult to establish when the defendant is not domiciled in Switzerland, e.g. when a claimant intends to sue in Switzerland a foreign subsidiary a Swiss parent company or a foreign subcontractor thereof.

In such a case, the uniform jurisdictional rules of the Lugano Convention are still applicable when the defendant is domiciled in another State bound by the Convention (Article 3 Lugano Convention). Is this not the case, the jurisdiction of Swiss courts is governed by the national rules included in the SPILA (Article 4 Lugano Convention).

Both the Lugano Convention and the SPILA provide for rules of specific jurisdiction based on the criteria of the place of the harmful event (Article 5(3) Lugano Convention; Article 129 SPILA). Based on these provisions, a claim in tort can be brought both at the place of the conduct and at the place of the event.[65] In the case of a tort abroad, a foreign subsidiary or subcontractor of a Swiss company can only be attracted before Swiss courts if acted from within Switzerland.

Of course, this raises difficult questions on what kind of conduct may be regarded as relevant for the purpose of jurisdiction. According to the case law, when a tort results from a plurality of acts, the place of each of these acts is relevant for the purpose of establishing jurisdiction, with the exclusion, however, of purely preparatory (preliminary) acts.[66] As far as the harmful acts of a foreign corporate entity are concerned, it goes without saying that not only the place of the material activity will be regarded as "the place of conduct", but also the place where the relevant decisions of the competent corporate bodies were taken. However, this will normally be insufficient to establish the jurisdiction of the Swiss courts because a companies' decision are normally taken at the place of administration, which in the case of a foreign company is also located abroad.[67]

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[64] Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers on human rights and business, (2 March 2016), para 34, *in fine*, "the doctrine of *forum non conveniens* should not be applied in these cases."

[65] *See* Bonomi (2011), 1097-8.

[66] DFT 125 III 346, points 4a and 4c; DFT 131 III 153, points 6.2 to 6.4.

[67] If not, the company would be regarded as domiciled in Switzerland under Article 60 of the Lugano Convention (see supra).

Would the answer be different if it is alleged (or proved) that the harmful decisions were actually taken and dictated by the Swiss parent company or facilitated by the latter lack of diligence? In this case, however, the harmful conduct (as an act or an omission) taking place in Switzerland would be that of the Swiss parent company – a company that is in any case subject to the jurisdiction of Swiss courts because of its domicile, as mentioned above. Such allegations would therefore normally prove insufficient to attract before Swiss courts the foreign subsidiary (and *a fortiori* an independent subcontractor).

In the *IBM(Geneva)/Germany* case,[68] the Swiss Supreme Court ruled on the jurisdiction of Swiss courts in a matter concerning the American company IBM's alleged involvement with the Nazi regime in Germany between 1933 and 1945. The claimants, who were detained in concentration camps during World War II, reproached IBM for supplying technology from its European branch in Geneva to the Nazi regime. They claimed for the civil compensation of the harm they had suffered based on Article 41 CO. A first instance judgment dismissing the claim for lack of jurisdiction was reversed by the Geneva Court of Appeal, which ruled that the Geneva courts had jurisdiction to hear the claim based on Article 129 SPILA. The Swiss Supreme Court affirmed this judgment. Without prejudice to the decision on the merits, the Court found that the claimant's allegation that IBM had supplied its Nazi clients with technology from its European branch in Geneva, was plausible.[69] Since it could not be excluded, on one hand, that IBM was responsible of acts of complicity in a genocide and, on the other hand, that such tortious acts had been committed in Geneva, this was sufficient for establishing the jurisdiction of the Geneva courts under Article 129 SPILA.

3.3 Jurisdiction over related claims

The jurisdiction of Swiss courts over a foreign company is very difficult to establish even when the claimant purports to sue simultaneously in Switzerland both a Swiss parent company and its foreign subsidiary (or a subcontractor).

For sure, Article 6(1) of the Lugano Convention provides for a quite broad basis for joining proceedings brought against a plurality of defendants, provided that "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings." However, as the other rules of special jurisdiction of the Convention, this provision is only applicable when the defendant is domiciled in a State bound by that instrument.[70]

By contrast, if the defendant's domicile is in a third country, Swiss jurisdiction can only be established on the basis of the SPILA. Now, according to Article 8a SPILA, when related claims are brought against several co-defendants, the Swiss court having jurisdiction over one of them can rule over all of the claims. For sure, this provision allows for the concentration of proceedings brought against several defendants; however, it is only applicable when every single defendant can individually be sued in Switzerland pursuant to other provisions of the SPILA. In other words, Article 8a SPILA does not provide a basis for international jurisdiction over foreign defendants, but only establishes which judicial authority is

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[68] Swiss Supreme Court, Decision 4C.296/2004, 22 December 2004, DFT 131 III 153.
[69] DFT 131 III 153 § 6.4. *See* Geisser (2013), 223.
[70] *See* the wording of Article 6 Lugano Convention ("A person domiciled in a State bound by this Convention may also be sued […]."). An analogical application of this provisions to defendants domiciled in third countries is suggested in Schwenzer, Hosang (2011), 279; however, this solution (although desirable *de lege ferenda*) is difficult to reconcile *de lege lata* with the choice made by the Swiss legislator in Article 8a SPILA (see *infra*). *See also* Geisser (2017), 963.

competent domestically, provided that all defendants are subject to the jurisdiction of Swiss courts.[71] When Swiss courts do not have jurisdiction over the foreign subsidiary (or subcontractor) of a Swiss corporation for harmful conduct taking place abroad, Article 8a SPILA is of no assistance.[72] For this reason, Article 8a SPILA is subject to some scholarly criticism for being too restrictive in international comparison.[73]

The same limitation also affects Article 8c SPILA, which allows the victim of a criminal act to bring a civil claim for compensation before the courts seized with the criminal proceedings. As Article 8a SPILA (and contrary to Art. 5(4) of the Lugano Convention), this provision does not create a jurisdictional basis against foreign defendants but only allows for consolidation of criminal and civil proceedings when the alleged tortfeasor is subject (on some other basis) to the jurisdiction of Swiss courts.[74]

This solution of Swiss private international law is also too narrow if one considers the Recommendation on Human Rights and Business.[75] The Committee of Ministers recommends that Member States consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses when there are brought against foreign subsidiaries, provided that such claims are closely connected with claims against the parent company.[76] In other words, courts should be able to exercise jurisdiction in such cases against both the parent company, based within the forum country, and the subsidiary, based in another jurisdiction.[77]

3.4 Forum of necessity

In the absence of other jurisdictional bases, a claimant can try to assert jurisdiction based on Article 3 SPILA. According to this provision, when there is no other basis for jurisdiction in Switzerland, and proceedings are impossible or cannot reasonably be brought in the foreign country, Swiss judicial authorities have jurisdiction provided that the case has a sufficient connection with Switzerland. This exceptional rule, called *forum necessitatis*, may be relevant for actions in torts against a subsidiary or a subcontractor of a Swiss company domiciled abroad. It applies under two cumulative conditions: first, proceedings are impossible or it cannot reasonably be expected that they are brought in a foreign country and, second, the dispute has a sufficient connection with Switzerland.[78]

Such conditions are not easily satisfied. In the only decision of the Swiss Federal Court addressing Article 3 SPILA in an action in torts, a Tunisian citizen sued Tunisia for compensation for acts of torture committed against him in that country by Tunisian nationals. The Court clarified that the goal of Article 3 is to avoid a denial of justice and that a forum of necessity could in principle be applied when the claimant risks of being politically persecuted abroad.[79] Legal scholars also unanimously consider that *forum necessitatis* should apply in

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[71] Bucher (2011), 100.
[72] Geisser (2013), 238.
[73] *Ibid*., 240; Geisser (2017), 963; Bucher (2011), 100; Schwenzer, Hosang (2011), 280.
[74] Bucher (2011), 103.
[75] Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers on human rights and business (2 March 2016).
[76] *Ibid*., § 35.
[77] Council of Europe, Explanatory Memorandum to Recommendation CM/Rec(2016)3, §57-59. *See also* Geisser (2017), 963.
[78] Geisser (2013), 262.
[79] Swiss Supreme Court, Decision 4C.379/2006, para 3.4 (22 May 2007).

cases dealing with human rights abuses abroad.[80] However, the court declined jurisdiction holding that the present case had no sufficient connection with Switzerland. At the time of the facts, the claimant had been resident in Italy. The fact that the claimant subsequently decided to establish in Switzerland at the time and that he had obtained political asylum in this country was (surprisingly) regarded as being insufficient.[81] The European Court of Human Rights has rejected a complaint against this decision, with a judgement[82] recently confirmed by the Grand Chamber.[83] To date, there is no reported case in Switzerland addressing the forum of necessity in a case concerning CSR.

4 Applicable law

4.1 Law applicable to rules relating to corporate structure (*lex societatis*)

Article 154(1) SPILA states that companies are governed by the law of the state under which they are organized. However, Article 154(1) SPILA does only apply to company law matters as defined in Article 155 SPILA. This covers issues relating to the company's organization and to the internal relationships between the company and its shareholders. By contrasts, assessing whether a parent company took all due care to prevent a harm caused by a subsidiary would be regarded as a matter of tort law, and not of company law. Therefore, the applicable law would have to be determined in accordance with the conflict of law rules relating to torts, as presented below.

4.2 Law applicable to rules belonging to the law of contract

In the area of contracts, Swiss choice-of-law rules are largely based on party autonomy. Under Article 116 SPILA, a contract is governed by the law chosen by the parties. The freedom of choice is very broad, no link being required between the contract and the chosen law. By a choice of law, the parties can derogate from the mandatory rules of the the law that would have applied in the absence of choice, subject only to overriding mandatory provisions and public policy. However, contrary to arbitration (Article 187 SPILA), the parties cannot validly choose a set of non-state rules (soft-law rules) as the law applicable to the contract; if they do it, their choice will only be regarded as an incorporation by reference, which cannot derogate from mandatory provisions of the applicable law.

In the absence of choice, the applicable law is that of the State having the closest connection to the contract. Subject to exceptional circumstances, such a connection is presumed to exist with the country of the habitual residence (or establishment) of the party who is to perform the characteristic obligation.

4.3 Law applicable to rules belonging to tort law

In international matters, the law applicable to claims in tort is to be determined by the SPILA. According to Article 133(2) SPILA, when the parties do not have their habitual residence in the same country, a claim in tort is governed by the law of the country in which the tort was

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[80] Bucher (2011), 64; Geisser (2013), 263; Schwenzer, Hosang (2011), 287.
[81] Swiss Supreme Court, Decision 4C.379/2006, para 3.5 (22 May 2007). See the criticism by Bucher (2011), 64 and Geisser (2013), 317- 320. By contrast, Schwenzer, Hosang (2011), 287, seem to accept such restrictive interpretation.
[82] CEDH, 21.6.2016, Naït-Liman, n° 51357/07.
[83] CEDH (Grand Chamber), 15.3.2018, n° 51357/07.

committed. However, if the result occurred in a different country, the law of the latter applies provided that the tortfeasor would have been able to foresee that the result would occur there.

In the case of CSR violations causing damages abroad, the tortfeasor is normally in a position to foresee where a damage could arise. Therefore, Swiss law would normally be inapplicable the torts under Article 133(2) SPILA. In particular, Article 41 CO (that governs fault liability) and Article 55 CO (that sets up the conditions of employer's liability) would generally not apply to such torts. This is the reason why both the responsible business initiative and its counter-proposal specify that the proposed due diligence obligation and liability provision should read as overriding mandatory provisions.

4.4 Public policy and overriding mandatory provisions

Swiss private international law does not entail specific exceptions to ensure respect for international human rights law or ILO Conventions. According to Article 17 SPILA, however, the application of provisions of foreign law is excluded if such application leads to a result that is incompatible with the Swiss public policy. Legal scholars and practice interpret the notion of Swiss public policy as including not only fundamental rights as protected by Swiss law, but also, increasingly, internationally recognized human rights standards.[84] When the application of a foreign law provision is incompatible with the Swiss public policy, the judge must correct that result to make it compatible with such principles.[85]

Article 18 SPILA provides another exception to the application of the referred applicable law. Overriding mandatory provisions of Swiss law pursuing a "special goal", are applicable regardless of the law referred to by the Private International Law Act. Overriding mandatory provisions typically aim at protecting essential interests of the social, political or economic order.[86] To date, there is no binding CSR rules in the Swiss legal system. The question of their mandatory nature is therefore not discussed yet.

The responsible business constitutional initiative aim at ensuring the overriding mandatory application of the proposed mandatory due diligence obligation and the conditions of liability: This is expressly stated in the text of Article 101a(2)(d) as proposed by the initiators.[87]

On the issue of the applicable law, the counter-proposal is very specific but somehow complex. It distinguishes between two types of claims in tort: claims based on general fault liability (Article 41 CO) and claims based on the specific liability for parent companies (proposed Article 55(1^{bis}) CO).

Regarding fault liability, the proposed Article 139a (1) SPILA requires application of Swiss law to determine the fault and the wrongfulness of the act or omission by companies that are subject to due diligence. In other terms, a judge will have to apply Swiss law to determine whether the company in Switzerland conducted the required due diligence; as mentioned before,[88] this also require to ascertain whether an international provision relating to human rights or the protection of the environment that is legally binding for Switzerland has been violated. A foreign law governing tort liability pursuant to Article 133 SPILA may

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[84] Geisser (2013), 367 and 372.
[85] *Ibid*. at 367.
[86] Swiss Supreme Court, DFT 136 III 23 (1 October 2009), para 6.6.1; Bucher (2011), 55. *See* also Geisser (2013), 444, and Kaufmann (2016), 49.
[87] Art. 101a(2)(d) Responsible Business Initiative, commentaries <https://www.news.admin.ch/NSBSubscriber/message/attachments/30134.pdf.>
[88] See *supra*, 2.3.

nevertheless apply (usually the law from the State where the damage occurred) when its application would lead to an adequate decision in light of a Swiss conception of law or when a fault and a wrongfulness are not required under such law.

Regarding the liability of a Swiss parent company for the harm caused by a controlled company having its seat abroad, the proposed Article 139a (2) SPILA only requires that Swiss law is "taken into account" in order to determine whether the Swiss company is liable or can be exonerated from such liability. Accordingly, the judges will have to determine whether there is a relationship of control within the meaning of Article 55(1bis) CO.

4.5 Ethical rules as a complement to the applicable law

Ethical rules, such as the UNGP or the OECD Guidelines on Multinational Enterprises may apply in theory as a complement to the applicable law. As presented above, there is no due diligence standard in Swiss law setting what is an expected conduct for Swiss-registered corporations operating abroad. In light of the absence of such due diligence standard, nothing prevents a ruling body to refer to international ethical rules of social corporate conduct to assess the conduct of Swiss-registered companies in a specific case. This could be relevant to determine whether a Swiss company committed a fault in tort law.[89] In practice, however, courts have not yet referred to international ethical standards, such as the UNGP or the OECD Guidelines to assess the conduct of Swiss-registered multinational corporations operating abroad.

5 Recognition and enforcement of judgments

5.1 Recognition and enforcement of foreign judgments in civil and commercial matters

Subject to specific bilateral treaties, foreign judgments in civil and commercial matters are recognised and enforced in Switzerland through two main channels. The Lugano Convention governs the recognition and enforcement of judgments rendered in a State bound by that instrument (Article 32 *et seq*. Lugano Convention), whereas the effects of judgments rendered in a third State are determined by the relevant provisions of the SPILA (Article 25 *et seq*. SPILA). The two regimes have some similarities, but present also very significant differences.

The most striking difference is that – contrary to most decisions under the Lugano regime – third country judgments can be recognised only if they were rendered by a court having jurisdiction within the meaning of Swiss law (Article 25(a) SPILA). With respect to foreign decisions rendered on tort law claims, the SPILA defines the jurisdiction of foreign courts in a very restrictive way. Such decisions are capable of recognition when they were rendered in the country where the defendant has its domicile or his place of business, provided that the claim arose out of the operation of such place of business (Article 149(1)(a) and 149(2)(d) SPILA) They are also capable of recognition, under the general rules, when the foreign court's jurisdiction was based on a valid choice-of-court agreement, or on the tacit acceptance by the defendants (Article 26(b) and (c) SPILA).

By contrast, a decision rendered in the country of the tort (i.e. both the place of the conduct and the place of the damage) can only be recognised if the defendant was not domiciled in Switzerland (Article 149(f) SPILA). This significant restriction prevents the recognition and enforcement in Switzerland of a decision rendered against a company having its seat in

[89] Bueno (2017), 1015.

Switzerland, even if the decision was rendered in the foreign country where the tort occurred.[90] It follows that, when the tort occurred in a third country, a claim against a company having its domicile in Switzerland should be brought before Swiss courts.

It should be noted that to the purpose of Article 149, the notion of "seat" is more restrictive than that of the Lugano Convention. Under Article 21 SPILA, a company normally has its domicile at the place of its statutory seat. If the corporate defendant is not registered in Switzerland but only has its central administration or its principal place of business there, Article 149 does not exclude the recognition of a foreign decision rendered at the place of the tort abroad.

No other jurisdictional basis can be invoked for the recognition of a foreign decision in a tort dispute. In particular, a decision rendered abroad against a foreign company on the basis of the connection existing with the claim simultaneously brought against a local company is not capable of recognition in Switzerland.

Beyond the jurisdiction of the foreign court, the SPILA provides for a number of grounds for denial of recognition, which are similar (although not completely identical) to those provided by the Lugano Convention (Article 27 SPILA, Art. 34 Lugano Convention). They are based on the violation of public policy, including fundamental principles of due process, and on the incompatibility with another Swiss or foreign judgments.

5.2 Recognition and enforcement of foreign judgments holding a company liable for breach of CSR rules

Subject to the jurisdiction of the foreign court and the absence of other grounds for refusal, nothing under the Swiss law should prevent the recognition and enforcement of a foreign judgment assessing the liability of a company for violation of CSR rules. In particular, the fact that the Swiss legal system does not include binding CSR rules yet would certainly not be an obstacle to the recognition of a foreign judgment based on the rules of a foreign law: as a matter of fact, the recognition of a foreign judgment in Switzerland is not affected by the law which was applied to the merits of the dispute, subject to public policy. Furthermore, there is no reason to believe that Swiss international public policy could be an obstacle to the recognition of such a judgement, provided – of course – that due process requirements were respected.

However, as mentioned above, Swiss law excludes the recognition and enforcement of a judgement rendered against a defendant domiciled in Switzerland, unless it was rendered at a foreign place of business (and the claim arose from the operation thereof), or jurisdiction was based on a choice-of-court agreement or on a tacit submission to the foreign court's jurisdiction.

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[90] See the criticism by Bonomi (2011), 1203.

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Annex I – Official reports on corporate social responsibility in Switzerland

Author	Title	Date of publication
Swiss Institute of Comparative Law (SICL)	Expertise concernant les obligations légales relatives aux mécanismes de diligence raisonnable en matière de droits de l'homme et d'environnement pour les activités menées par les entreprises à l'étranger	6 September 2013
Swiss Centre for Expertise in Human Rights(SCHR)	Mise en oeuvre des droits humains en Suisse : Un état des lieux dans le domaine droits de l'homme et économie	21 November 2013
Federal Council	Rapport de droit comparé : Mécanismes de diligence en matière de droits de l'homme et d'environnement en rapport avec les activités d'entreprises suisses à l'étranger	2 May 2014
Federal Council	La responsabilité sociétale des entreprises: Position et plan d'action du Conseil fédéral concernant la responsabilité des entreprises à l'égard de la société et de l'environnement	1 April 2015
SCHR (C. Kaufmann et al.)	Extraterritorialität im Bereich Wirtschaft und Menschenrechte: Extraterritoriale Rechts-anwendung und Gerichtsbarkeit in der Schweiz bei Menschenrechtsverletzungen durch transnationale Unternehmen	16 August 2016
Federal Council	Rapport sur la stratégie de la Suisse visant à mettre en œuvre les Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme (NAP)	9 December 2016
SCHR/SICL (C. Kaufmann/L. Heckendorn)	Access to Remedy	15 October 2018
Federal Council	Rapport : Entreprises et droits de l'homme : analyse comparée des mesures judiciaires offrant un accès à la réparation	14 September 2018

Annex II - Text of the Responsible Business Initiative (non-official English translation)

Art. 101a Responsibility of business

[1] The Confederation shall take measures to strengthen respect for human rights and the environment through business

[2] The law shall regulate the obligations of companies that have their registered office, central administration, or principal place of business in Switzerland according to the following principles:

[a] Companies must respect internationally recognized human rights and international environmental standards, also abroad; they must ensure that human rights and environmental standards are also respected by companies under their control. Whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship.

[b] Companies are required to carry out appropriate due diligence. This means in particular that they must: identify real and potential impacts on internationally recognized human rights and the environment; take appropriate measures to prevent the violation of internationally recognized human rights and international environmental standards, cease existing violations, and account for the actions taken. These duties apply to controlled companies as well as to all business relationships. The scope of the due diligence to be carried out depends on the risks to the environment and human rights. In the process of regulating mandatory due diligence, the legislator is to take into account the needs of small and medium-sized companies that have limited risks of this kind.

[c] Companies are also liable for damage caused by companies under their control where they have, in the course of business, committed violations of internationally recognized human rights or international environmental standards. They are not liable under this provision however if they can prove that they took all due care per paragraph b to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.

[3] The provisions based on the principles of paragraphs a-c apply irrespective of the law applicable under private international law.

Annex III - Text of the parliamentary indirect counter-proposal (November 2018)

Art. 716a - Attributions inaliénables

[1] Le conseil d'administration a les attributions intransmissibles et inaliénables suivantes:[…]

[5] exercer la haute surveillance sur les personnes chargées de la gestion pour s'assurer notamment qu'elles observent la loi, les statuts, les règlements et les instructions données; ainsi que les dispositions relatives à la protection des droits de l'homme et de l'environnement, y compris à l'étranger;

Art. 716a[bis] – Respect des dispositions relatives à la protection des droits de l'homme et de l'environnement, y compris à l'étranger

[1] Le conseil d'administration prend des mesures pour garantir que la société respecte aussi à l'étranger les dispositions déterminantes dans ses domaines d'activité relatives à la protection des droits de l'homme et de l'environnement. Il identifie les conséquences potentielles et effectives de l'activité de la société sur les droits de l'homme et l'environnement et les évalue. En tenant compte des possibilités d'influence de la société, il met en œuvre des mesures visant à réduire les risques constatés et à réparer les violations. Il surveille l'efficacité des mesures et en rend compte. Cette diligence porte également sur les conséquences de l'activité de sociétés contrôlées et de relations d'affaires avec des tiers.

[2] Dans le cadre de son devoir de diligence, le conseil d'administration se penche en priorité sur les conséquences les plus graves sur les droits de l'homme et l'environnement. Il veille au principe de l'adéquation.

[3] Cet article s'applique aux sociétés qui, au cours de deux exercices consécutifs, dépassent, à elles seules ou conjointement avec une ou plusieurs entreprises suisses ou étrangères contrôlées par elles, deux des valeurs suivantes: a. total du bilan: 40 millions de francs; b. chiffre d'affaires: 80 millions de francs; c. effectif: 500 emplois à plein temps en moyenne annuelle.

[4] Il s'applique aussi aux sociétés dont l'activité représente un risque particulièrement élevé de violation des dispositions relatives à la protection des droits de l'homme et de l'environnement, y compris à l'étranger. Il ne s'applique pas aux sociétés dont l'activité représente un risque particulièrement faible. Le Conseil fédéral édicte des dispositions d'application en la matière.

[5] Cet article ne s'applique globalement pas aux sociétés contrôlées par une entreprise à laquelle l'article s'applique. À l'exception de l'obligation de rendre compte, il s'applique aux sociétés qui contrôlent elles-mêmes une ou plusieurs entreprises étrangères, lorsqu'elles dépassent toutes ensembles les valeurs seuils fixées à l'al. 3 et que leurs activités ont un lien étroit ou lorsque les activités des entreprises étrangères représentent un risque particulier au sens de l'al. 4.

[6] Par dispositions relatives à la protection des droits de l'homme et de l'environnement, y compris à l'étranger, on entend les dispositions internationales contraignantes pour la Suisse en la matière.

Art. 55 1bis CO Responsabilité de l'employeur

[1] L'employeur est responsable du dom mage causé par ses travailleurs […]

[1bis] Ces principes s'appliquent aussi aux entreprises légalement tenues de respecter les dispositions relatives à la protection des droits de l'homme et de l'environnement, y compris à l'étranger, pour le dommage que des entreprises qu'elles contrôlent effectivement ont causé, dans l'exercice de leur activité professionnelle ou commerciale, à la vie ou à l'intégrité corporelle d'autrui ou à la propriété à l'étranger, en violation des dispositions relatives à la protection des droits de l'homme et de l'environnement. Les entreprises ne répondent d'aucun dommage si elles apportent la preuve, en particulier, qu'elles ont pris les mesures de protection des droits de l'homme et de l'environnement prévues par la loi pour empêcher un dommage de ce type ou qu'elles ne pouvaient pas influencer le comportement de l'entreprise contrôlée concernée par lesdites violations légales.

[1ter] Une entreprise ne contrôle pas une autre entreprise uniquement parce que cette dernière dépend économiquement d'elle.

Art. 139a LDIP – Violation des dispositions relatives à la protection des droits de l'homme et de l'environnement, y compris à l'étranger

[1] En cas de prétentions, envers des sociétés tenues par le droit suisse de respecter les dispositions relatives à la protection des droits de l'homme et de l'environnement, y compris à l'étranger, en raison de dommages causés à la vie ou à l'intégrité corporelle d'autrui ou à la propriété à l'étranger à la suite d'une violation des dispositions précitées, l'illicéité et la culpabilité sont appréciées sur la base de ces dispositions. Elles sont toutefois régies par le droit applicable au sens de l'art. 133 si cela conduit, en fonction du but des dispositions de ce droit et des conséquences qu'aurait leur application, à une décision adéquate au regard de la conception suisse du droit, ou s'il n'y a illicéité et culpabilité au regard de ce droit.

[2] Pour juger si une société qui a son siège en Suisse et contrôle en fait une société qui a son siège à l'étranger est considérée, dans le droit, comme responsable en cas de prétentions du même type, et si cette société peut être libérée d'une responsabilité, on tiendra compte du droit suisse.

[3] L'art. 132 est réservé.